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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

GERMAN ROSAS ARENAS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 17-1-00613-2
The Honorable Gretchen Leanderson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it allowed a prosecution witness to testify about the contents of a photograph that was neither offered nor admitted at trial.
2. The trial court violated German Arenas' confrontation rights when it allowed a prosecution witness to relate testimonial hearsay statements of a non-testifying eyewitness.
3. The trial court violated German Arenas' right to present a defense when it refused to grant a continuance so that a critical defense witness could be called to testify.
4. The cumulative effect of the trial court's errors denied German Arenas a fair trial.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the rules of evidence require that the contents of a photograph be proved by admitting the photograph itself, did the trial court abuse its discretion when it allowed a prosecution witness to testify about the contents of a photograph that was neither offered nor admitted at trial?
(Assignment of Error 1)
2. Did the trial court violate German Arenas' confrontation rights when it allowed the investigating officer to relate

statements made by a non-testifying eyewitness describing what he observed and photographed during the incident?
(Assignment of Error 2)

3. Where the defense established that its investigator would testify that a critical prosecution witness had said he could not identify the suspect during a pretrial interview, but testified at trial that he could identify the suspect, and that the investigator was currently unavailable to testify, did the trial court violate German Arenas' right to present a defense when it denied his request for a one week continuance?
(Assignment of Error 3)
4. Did the cumulative effect of the trial court's errors deny German Arenas a fair trial? (Assignment of Error 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged German Rosas Arenas by Amended Information with one count of unlawful possession of a stolen vehicle (RCW 9A.56.068, .140). (CP 4) The jury convicted Arenas as charged. (CP 59; RP 233) The trial court imposed a standard range sentence of 14 months. (CP 65, 68; RP 239, 242) Arenas filed a timely Notice of Appeal. (CP 81)

B. SUBSTANTIVE FACTS

On February 7, 2017, Rebecca Rogge parked her white 1990 Honda Civic and went inside a Tacoma restaurant to eat lunch. (RP 184-85) The Honda's license plate was AZL1521, and at the time it had no ignition or other significant damage. (RP 184, 186) When Rogge returned after lunch, her car was gone. She had not given anyone permission to take the Honda. (RP 185)

Later that afternoon, Nicole Ocasio saw two men removing the license plate from her 1995 Honda Civic. (RP 129-30, 132-33) One of the men was tall and bald and looked Hispanic. (RP 131, 133) The other man was wearing a hooded sweatshirt so Ocasio could not see his face clearly. (RR 131-32) Ocasio reported the theft to the police. (RP 132)

Around 11:40 that night, Pierce County Sheriff Deputy Isaac Finch noticed a white Honda Civic fail to stop at a stop sign. (RP 139, 150) He ran the license plate, AUK6662, and learned that it was the same number plate Ocasio had earlier reported stolen. (RP 129, 140-41) Deputy Finch requested backup units and continued to follow the Honda as it entered Interstate 5. (RP 141, 142)

When the Honda abruptly exited the Interstate, Deputy Finch

turned on his lights and siren and continued to follow the car. (RP 142-43) The Honda sped away but eventually collided with a barrier and came to rest. (RP 144-45) Deputy Finch stopped his vehicle about 15-20 feet away. (RP 145) Deputy Finch testified that a driver and passenger both exited the Honda and ran away in different directions. (RP 145, 147, 149) The passenger, a bald, short Hispanic or African-American male, was wearing a dark hooded sweatshirt. (RP 146) As the passenger ran towards the nearby Emerald Queen Casino, Deputy Finch and his canine partner tracked and apprehended the driver, identified as Carlos Cuellar. (RP 148-49)

Deputy Finch testified that the Honda's steering column and ignition had obvious damage and exposed wire, which is consistent with the car having been stolen. (RP 151) He also testified that it is common for a stolen car to also have license plates stolen from a different car. (RP 151)

Deputy Justin Watts responded to Deputy Finch's call for backup. (RP 158) When he arrived he saw a man running towards the casino, so he tried unsuccessfully to follow him. (RP 161-62) Later, however, a tribal police officer showed Deputy Watts a photograph of a man they had detained, German Arenas. (RP 164,

165) Tribal police told Deputy Watts that they had seen Arenas running into the casino. (RP 163-64) Deputy Watts recognized Arenas from an interaction a few weeks earlier. (RP 165-66)

When Deputy Watts contacted Arenas at the casino, he was wearing jeans and a t-shirt, not a hooded sweatshirt. (RP 167) And Deputy Watts did not recognize the man he saw running toward the casino. (RP 167) In fact, none of the officers on the scene indicated at the time that they recognized Arenas as the passenger. (RP 195)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED ARENAS' CONFRONTATION RIGHTS WHEN IT ALLOWED DEPUTY WATTS TO TESTIFY ABOUT THE ORIGIN AND CONTENTS OF A PHOTOGRAPH PURPORTEDLY TAKEN AT THE EMERALD QUEEN CASINO.

Deputy Watts testified that tribal police showed him a photograph of a man who tribal police said they saw running into the casino. (RP 164-65) Deputy Watts recognized the man as Arenas. (RP 164-65) Arenas objected to any testimony describing the content of the photograph because the photograph itself was not being offered or admitted. Arenas argued that the testimony violated ER 1002, the "best evidence" rule. (RP 163-64, 164-65) The trial court disagreed and allowed the testimony, even though

the photograph was not admitted and even though no tribal police officer testified to its authenticity or the circumstances of its creation. (RP 165) The trial court abused its discretion, and also violated Arenas' constitutional right to confrontation, when it overruled Arenas' objection and allowed the testimony.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

First, the testimony should not have been admitted without also authenticating and admitting the photograph. ER 1002 plainly states that, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required[.]" Under the plain terms of this rule, the State should not have been allowed to elicit testimony that the photograph showed Arenas entering the casino. The trial court abused its discretion when it overruled Arenas' objection on these grounds.

Furthermore, the admission of Deputy Watts' testimony also

resulted in a violation of Arenas' confrontation rights.¹ The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses against them.² Unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness, the confrontation clause prohibits admission of "testimonial" statements of a witness who does not take the witness stand at trial, even if the statements would otherwise be admissible under the rules of evidence. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); see also *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).³

Statements made by an informant or eyewitness in the course of an investigation for the purpose of apprehending a suspect are statements that an objective witness would reasonably

¹ Arenas did not object on these grounds below. As argued in the body of the brief, however, this error violated the constitutional right to confrontation and was prejudicial. Therefore, Arenas may raise this issue for the first time on appeal because it is a "manifest error effecting a constitutional right." See RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

² "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. Const. amend. VI. The Washington Constitution provides: "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . ." Wash. Const. art. I, § 22.

³ Alleged confrontation clause violations are reviewed de novo. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

believe would be available for use at a later trial. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); *Davis v. Washington*, 547 U.S. at 830 (holding statements by assault victim to police dispatcher were testimonial); see also *State v. Johnson*, 61 Wn. App. 539, 547, 549, 811 P.2d 687 (1991) (admission of statements by unnamed officer who prepared a search warrant affidavit and unnamed informant who provided the information violated confrontation rights) (quoting *Postell v. State*, 398 So.2d 851, 854 (Fla. Dist. Ct. App. 1981) (where “a non-testifying witness has furnished the police with evidence of the defendant’s guilt, the testimony is hearsay, and the defendant’s right of confrontation is defeated”))).

Likewise, a statement made by one police officer to another during the course of an investigation, for the purpose of apprehending a suspect, is also a statement that an objective witness would reasonably believe would be available for use at a later trial. The tribal police officer’s statement to Deputy Watts, explaining that they had a photograph of a man they saw running into the casino, was therefore testimonial. But Arenas was denied the opportunity to cross examine the unnamed tribal officer or officers about what they witnessed and about the photograph’s

creation or contents. Arenas' confrontation rights were therefore violated. See *Johnson*, 61 Wn. App. at 549.

Reversal is required "where there is any reasonable possibility that the use of the inadmissible evidence was necessary to reach a guilty verdict." *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Confrontation clause errors are subject to the stricter constitutional harmless-error analysis. *State v. Wilcoxon*, 185 Wn.2d 324, 335, 373 P.3d 224 (2016), *cert. denied*, 137 S. Ct. 580, 196 L. Ed. 2d 455 (2016) (citing *Chapman v. California*, 386 U.S. 18, 22-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). A violation of a criminal defendant's constitutional right of confrontation may be harmless error if "the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *State v. Palomo*, 113 Wn.2d 789, 799, 783 P.2d 575 (1989) (quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

Under either standard, the admission of the testimony relating to the photograph and what it purported to show was not harmless error in this case. Deputy Watts testified that he saw a man running towards the casino. (RP 161) He could not identify

the man at that time. (RP 167) But once Deputy Watts saw the photograph, he recognized Arenas. (RP 165) Evidence that tribal police saw and photographed Arenas running into the casino strongly implicated Arenas as the man Watts had just seen running away from the stolen Honda. And without the statements of tribal police and their photograph, Deputy Watts would not have been able to connect Arenas to the Honda. The remaining evidence regarding the identity of the passenger was not so overwhelming that it necessarily leads to a conclusion of guilt. Without this evidence, a reasonable jury would most likely have had a reasonable doubt that Arenas was the passenger.

B. THE TRIAL COURT'S FAILURE TO GRANT ARENAS A CONTINUANCE VIOLATED HIS RIGHT TO A FAIR TRIAL.

The trial court's failure to grant Arenas a continuance so that he could call a material witness in his defense deprived Arenas of his due process rights to compulsory process and to present a defense. The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982). The decision is discretionary because the court must consider various factors such as diligence, materiality, due process, a need for an orderly

procedure and the possible impact on the result of the trial. *State v. Eller*, 84 Wn.2d 90, 524 P.2d 242 (1974). The decision to deny the defendant a continuance may be disturbed on appeal upon a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted. *Kelly*, 32 Wn. App. at 114.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution both grant criminal defendants the right to present evidence and testimony in their own defense. See *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). “The constitutional right of the accused to have compulsory process to obtain witnesses in his defense is well established.” *Dickerson v. Alabama*, 667 F.2d 1364, 1369 (11th Cir.) (citing *Washington*, 388 U.S. at 19). *cert. denied*, 459 U.S. 878 (1982).

Under certain circumstances, denial of a continuance may violate the defendant’s constitutional rights to a fair trial or to compulsory process. While not every denial of a motion for continuance to obtain witnesses violates the accused’s right to compulsory process, a court may not refuse to grant a reasonable

continuance request where it has been shown that the testimony would be relevant and material to the defense. *Dickerson*, 667 F.2d at 1370.

Arenas made such a showing here. On direct examination, Deputy Finch testified that he recognized Arenas as he exited the passenger side of the Honda. (RP 147) On cross-examination, Deputy Finch did not recall saying during a defense interview that he only recognized Arenas from booking photographs. (RP 152) Arenas requested a brief one-week continuance so that he could call the defense investigator to contradict Deputy Finch's testimony regarding his identification of Arenas. (RP 172, 179-80, 197, 202) Defense counsel explained that he was surprised by Deputy Finch's testimony on direct, and had not expected that he would need to call the investigator. However, the investigator was at the time out of the area and unable to immediately return to Pierce County due to a work conflict. (RP 198, 202) The trial court denied the motion on the grounds that defense counsel should have requested a continuance due to witness unavailability before the jury was empaneled. (RP 197-98)

Arenas established that the testimony of the investigator would be highly relevant and material because Deputy Finch was

the only witness who testified that he saw the passenger and knew it was Arenas. The other officers testified that they did not recognize the passenger and did not get a close look at his features. Evidence that Deputy Finch originally said he did not recognize the passenger would have called his credibility into doubt, and could have influenced the jury.

Arenas also adequately explained why this defense witness was not originally thought to be necessary, and why the witness was unavailable. The trial court made no effort to determine whether the jury could recess and be called back after a short break, and instead simply denied the defense request. Arenas' inability to call his defense investigator to contradict Deputy Finch was highly prejudicial and denied Arenas a fair trial.

C. CUMULATIVE ERROR DENIED ARENAS A FAIR TRIAL.

An accumulation of non-reversible errors may deny a defendant a fair trial. *State v. Perrett*, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). Where it appears reasonably probable that the cumulative effect of the trial errors materially effected the outcome of the trial, reversal is required. *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

As argued in detail above, each of the trial court's

evidentiary errors—failure to exclude testimony relating to the statements of tribal police and their photograph and failure to allow time for the defense to call a critical witness—severely prejudiced Arenas’ right to a fair trial and materially effected the outcome of trial. But if either one of the above issues standing alone does not warrant reversal of Arenas’ convictions, the cumulative effect of these errors certainly materially effected the outcome of the trial.

The primary point of contention at trial was the identity of the passenger in the Honda who fled towards the casino. (RP 213-14, 216-17, 220-21) Without convincing proof that Deputy Finch recognized the passenger, and without evidence that Arenas was seen running into the casino, the State would not have been able to establish that Arenas was the passenger. Each of the trial court’s errors alone denied Arenas a fair trial, but the cumulative prejudice of the errors cannot be denied and Arenas’ conviction must be reversed. See *Perrett*, 86 Wn. App. at 322-23 (and cases cited therein).

V. CONCLUSION

The trial court abused its discretion and violated Arenas’ Sixth Amendment right to confrontation when it admitted the photograph and testimony describing its contents and the

circumstances of its creation. The trial court also violated Arenas' constitutional right to call witnesses in his defense when it refused to grant a continuance. These errors were not harmless and denied Arenas a fair trial. His conviction should be reversed.

DATED: November 10, 2017



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CERTIFICATE OF MAILING

I certify that on 11/10/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: German R. Arenas, DOC# 353529, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.



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